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**I'M SICK TO DEATH OF "FRIVOLOUS LAWSUIT"
RHETORIC! WHO CAN I SUE?**

**(A RUBRIC FOR TEACHERS, POLICYMAKERS AND
FOR REFORMATION OF THE PUBLIC DISCOURSE)**

by
Mark J. DeAngelis*

I. INTRODUCTION

The only way to have missed the reports of the purported present and ongoing crisis in America resulting from the proliferation of "frivolous lawsuits" is to have been in a prolonged coma. Media commentary and editorializing about frivolous lawsuits, junk lawsuits, lawsuit abuse, greedy trial lawyers, suit-happy shysters, a litigious society, lack of personal responsibility, and other plague-like legal disorders are as ubiquitous as news reports of young female actresses behaving badly. Even syndicated news reports of recently filed lawsuits highlight the ridiculous and the lurid to steer even the most discriminating reader toward a negative characterization while burying the explanatory facts.¹ Add to this notoriety the vast unregulated realm of the blogosphere, websites, *YouTube*, and the more traditional letters-to-the-editor, and there is no end to the expression of opinions about the evils of frivolous lawsuits and the manipulations of fact to create the impression of an epidemic of frivolity.

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With such a vast and dangerous lurking evil about, it is hardly surprising that policymakers have put forth a plethora of proposals to save a somnolent society from certain destruction at the hands of litigious lawyers. These diverse and far-ranging scattershot plans fall loosely together under the umbrella designation of "tort reform." Exceptional, indeed, is the bureaucratic regime that is not in need of reform; and the civil justice system can claim no such exception. However, meaningful reform requires, in the first instance, a clear identification of the deficiencies that need to be remedied. Too many tort reform proposals affect all lawsuits regardless of where the lawsuit falls on the spectrum of "frivolity." As a society, we cannot make ourselves free of frivolous lawsuits until we can define those qualities that render a lawsuit frivolous. This article proposes a method to identify and categorize lawsuits by the qualities of their elements to isolate and identify those which should rightly be the target of proposed reform. Conversely, proposed reforms may be compared to the lawsuit rubric to determine their potential effectiveness in limiting or affecting "frivolous" suits without burdening bona fide suits. If reform for the sake of social improvement is the goal, then "tort reformers" must show the ability get past the rhetoric and seek to remove the "frivolity" rather than the "suit" from "frivolous lawsuits."

Many students enter Business Law class with some opinions on these issues. These opinions tend to be somewhat loosely formed and based on generalizations and stereotypes. This article proposes a more rigorous examination of the nature of a lawsuit that may be used as a pedagogical tool to guide students in a more disciplined exploration of this important public policy issue. Likewise, it is suggested that lawmakers who make the policy in this area and political commentators who shape the public discourse on this subject would be well served to employ this rubric to explore real, focused and effective reform rather than rhetoric.

There will be no attempt in this article to analyze or categorize suggested reforms. That is a likely exercise for the future, once this rubric has been conceptualized and tested. This article looks at the lawsuit that might be saddled with the unfortunate "frivolous" label and attempts to determine what aspect of its make-up might cause it to earn that designation.

II. THE LEGAL STANDARD OF "FRIVOLOUS"

The "frivolous" designation that this paper addresses is the colloquial or political or rhetorical label (one hesitates to use the word "standard," under the circumstances). This designation is a wholly separate and distinct consideration from the legal standard of "frivolous" as embodied in Rule 11 of the Federal Rules of Civil Procedure and the relevant cases. State courts have likewise adopted rules similar to Rule 11 which allow the sanctioning of lawyers who bring frivolous claims.² Obviously, any lawsuit that falls so far below the legal standard of viability so as to warrant the imposing of sanctions is a lawsuit that the legal system recognizes as problematic and has already taken steps to discourage through these rules. Whether one believes those rules to be effective may be another issue to explore. However, for purposes of this article, it is assumed that these lawsuits, the legally frivolous lawsuits, are not the ones that are a significant target of tort reformers. These suits, typically easy targets for dismissal early in the process, are not the lawsuits that are alleged to be bankrupting business through the generation of exorbitant legal fees or runaway verdicts.

III. THE NEED FOR A RUBRIC

Supreme Court Justice Potter Stewart dealt with the problematic task of defining "pornography" by famously writing, "I know it when I see it."³ Unfortunately, in labeling a lawsuit as frivolous, Justice Stewart's subjective and

amorphous test has too often been the standard of definition. In its broadest sense the designation "frivolous" has been appended to lawsuits in order to designate a lawsuit with which someone disagrees. "If you sue me, your lawsuit must be frivolous." "If you sue my friends, your lawsuit is frivolous." "If you sue anyone in my industry, the lawsuit is frivolous." "If you sue a business, the lawsuit is frivolous." Continuing in this fashion, "frivolous" means nothing more than a claim that adversely affects someone's interests.

The frivolous lawsuit therefore becomes the straw man target for all complaints about the legal system. No one can credibly disagree with reforms which target "frivolous" lawsuits. It would be absurd for anyone to support the promotion of "frivolous" lawsuits. One could hardly scoff at the righteousness of a chivalrous knight's plan to battle invading ferocious giants. That is, until the giants targeted by the hapless Don Quixote are exposed as harmless and functional windmills. The attempt here, then, is to map out the range of lawsuit characteristics, so that policymakers may more readily identify those lawsuits which are problematic for society and for which the present system does not provide sufficient protection or redress. This rubric can minimize future tilting at windmills, or, with more effect, expose the frivolous lawsuits for their true nature.

IV. THE RUBRIC

This method identifies three variables that contribute to the characterization of a lawsuit: strength of the law supporting the claim; strength of the facts supporting liability; extent of the injury or damage. For ease of reference, we will label them respectively: Law, Liability, and Damages and assign them to axes along which their values may be plotted or conceptualized.

Law = x
 Liability = y
 Damages = z

The measure of the strength of each variable is suggested to be the same measures used in grading scales in classroom (A-F, from the highest or strongest value to the lowest or weakest value). Recognizing that the strength of any variable will be a designation that lies somewhere along the grading continuum, for ease of discussion and conceptualization, this paper will use only the end points of the continuum, designating a variable's strength as either "A" or "F." Therefore the possible values are:

AAA

AAF AFA FAA

AFF FFA FAF

FFF

A. Law (x axis)

What is evaluated here is the strength of the legal theory that is relied upon in bringing the action. The McDonald's coffee case still heads many publicized lists of frivolous suits.⁴ The legal theories of negligence and product liability, as evidenced by the facts of the case,⁵ are supported by a mature and rational history of common law decisions. Consequently, The McDonald's coffee suit would likely garner a value of "A" on the Law (x) axis.

Finding an example of a case that warrants an "F" value on this axis is a bit more difficult. The legal system contains a number of fail-safe mechanisms that discourage the bringing

of lawsuits based on weak legal theories. Most notably, the complexity of the system encourages the assistance of counsel and the contingent fee system discourages counsel from bringing lawsuits based on weak legal theories. Perhaps an example might be a civil rights lawsuit filed under 42 U.S.C. sec. 1983 on behalf of two female high school basketball players at Catholic High Schools who were prevented from playing for a season as the result of school transfers.⁶ A section 1983 claim must be based on "state action." The defendants in this case were a Catholic Archdiocese and other Catholic school administrators. The case was dismissed for failure to state a claim, earning an "F" on the Law (x) axis.

Another candidate for an "F" value might be the "Fear Factor" lawsuit.⁷ The pro se plaintiff sued NBC after dizzily running into a doorjamb in his house as a result of spiking blood pressure, nausea and vomiting induced by watching contestants eat rats on the network's "Fear Factor" program. The legal basis for the suit is not clearly evident (negligent infliction of emotional distress, perhaps, but is there a duty owed?). Without further clarification, the Fear Factor plaintiff's claim earns the lowest grade on the Law (x) axis.

B. Liability (y axis)

This variable probably presents the greatest diversity and wealth of opportunity for evaluation. It is not unusual for a lawyer to file an action that rests on sound legal theory but attempts to stretch that theory to reach facts previously not included within the range of recovery. In January of 2008 it was reported that an inmate in a county jail in Colorado sued the Sheriff's Department after the inmate fell 40 feet and suffered serious injuries in his second escape attempt.⁸ The legal theory lies in a combination of negligence and intentional torts. The plaintiff claims that the guards and other inmates beat him mercilessly so that he had no option but to

attempt to escape, a circumstance which the sheriff's department should have anticipated. Aware that the inmate needed to attempt to escape, he alleges that the sheriff's office should have rendered the jail more secure. In fact, the plaintiff's allegations apparently claim that the building was so poorly secured that its condition constituted an "open invitation" to escape.⁹ While the lawyer who filed this suit is certainly acting within the parameters of zealous representation, his case earns an "F" value on the Liability (y) axis.

Another example of a case with a low y axis value might be that of the plaintiff who sued a strip club after suffering a whiplash when the stripper, "flung [her breasts] in his face, knocking his head backwards"¹⁰ His legal theories of recovery in negligence, intentional tort and *respondeat superior* would appear to have merit. And while we cannot determine the extent of his physical injury from a brief news report; it is certainly possible for a whiplash to have serious repercussions. However, the facts lack an element of sufficient wrongdoing on the alleged tortfeasor and an inference of plaintiff's own participation, if not invitation (assumption of the risk, perhaps) to engage in this conduct. The case earns an "F" value on the y axis.

C. Damages (z axis)

If the Law (x) axis presents the least and most difficult options for value determination and the Liability (y) axis provides the most diverse, then it is likely that the Damage (z) axis provides us with the easiest value determinations. While there may be disagreement as to the precise value a certain damage claim may earn along the spectrum of the axis, the extremes tend to be more easily identified. According to news reports, the hapless would-be escapee in Colorado mentioned in the previous analysis, suffered "serious" injuries.¹¹ Stella Liebeck, the elderly plaintiff in the McDonald's coffee case

suffered third degree burns to "6 percent of her body, including her inner thighs, perineum, buttocks, and genital and groin areas."¹² Both of these cases may fairly earn the value of "A" on the Damage (z) axis.

On the lower end of the scale there is the lawsuit filed by a pair of Chicago attorneys against Penthouse Magazine.¹³ The lawyers' clients had apparently been disappointed when the nude pictures that appeared in Penthouse turned out not to be tennis star Anna Kournikova, as advertised, but a clever look-alike. Each client had shelled out \$8.99 for the issue which, apparently, was rendered valueless by the magazine's misrepresentation. Plaintiff's also sued for the value of their "disappointment." This case conceivably comes out well on the law (x) axis (fraud), and may also do well on the liability (y) axis (*scienter*), but earns the "F" score here on the Damages (z) axis.

V. LIMITATIONS TO THE RUBRIC

A. Challenges to the propriety of certain legal theories

In considering the value of the "law" along the x axis, this rubric does not make allowance for any public policy challenges of the law, itself. That is, the rubric seeks to evaluate the relative strength or weakness of the legal theory upon which the case is based without making a judgment as to the public policy value of the law allowing or denying recovery. There are any of a number of lawsuits reported where would-be burglars have come upon a booby-trapped home and suffered injury as a result.¹⁴ Negligence legal theory generally allows an avenue for recovery. However, a tort reformer might feel that the law should not provide even a potential avenue for recovery. This type of reform would involve a statutory change in the common law of tort rather than a procedural change to discourage or weed out cases with

low y axis values (Assuming death or serious injury resulted, the burglar cases probably warrant an AFA designation).

B. Subjectivity

Where one person sees strength, another sees weakness. Or, more specifically, what one person considers strong law or facts may be perceived as less compelling by another. Part of that is the inherent subjectivity that comes from different upbringings, education, understandings of the world, prejudices, beliefs, etc. that "the law" seeks to battle with objectifying concepts such as *stare decisis*.

However, the greater part of the subjectivity of assigning values can be eliminated by research and understanding of the applicable facts. For example, recently a student wrote railing about the absurdity of the verdict against McDonald's "just because the coffee cup didn't warn against its contents being hot" (this was before she was exposed to the actual facts and the basis for liability). Of course, upon exposure to the real facts, her objection waned.

A better example probably comes from the "Naked Cowboy" suit. In February 2008, Robert Burck filed suit against Mars Corp. for trademark infringement.¹⁵ Mr. Burck is better known as the "Naked Cowboy" of Times Square where, clad only in tight white cotton briefs and cowboy boots and hat, he plays the guitar and sings. The Mars Corp. ran an electronic billboard featuring various New York City locations and M&M's dressed as famous New Yorkers. Burck filed suit alleging that one of the M&M's was dressed in his trademark outfit.

One who had never before heard of the Naked Cowboy might view the offending M&M image and determine that it looked like a baby wearing a diaper. This lack of familiarity with the subject of the suit might lead to the hasty conclusion

that Burke's suit was most likely a publicity stunt. In the structure of this rubric, one would have rated the Law with an "A" value (commercial appropriation and trademark infringement); the Liability with a value of "F" (lack of any notoriety to appropriate and no trademark to infringe upon); the Damages likewise with an "F" (no value to the fame traded upon since there was no fame to trade upon). However, upon investigation it may be discovered that the "Naked Cowboy" was an iconic New York figure whose fame and act were well known. An internet search easily reveals Mr. Burck's website which prominently includes his trademark registration information.¹⁶ Hence, an unenlightened view of the case was as an AFF case; while an enlightened view was closer to an AAA case.

C. Overlap

There is a significant amount of overlap in the characteristics that are attempted to be defined by each axis. For instance, it is inherently difficult to evaluate the strength of the Law (legal theory) in a case without considering the facts supporting liability. In the 1990's, Richard Overton sued Anheuser-Busch for false and deceptive advertising.¹⁷ He claimed that the ads depicting a glamorous lifestyle lived by those imbibing the Anheuser-Busch products caused him to actually consume the products in an attempt to achieve the depicted lifestyle. The dissatisfied plaintiff sued for mental injury, emotional distress and financial loss. Certainly the law allows for recovery for damages resulting from false and deceptive advertising. However, in this case, the facts are so weak as to undermine the legal theory. The court dismissed the case essentially stating that any reasonable person would have understood the advertising to be something less than factual representations. Therefore, the facts were insufficient as a matter of law. It is not clear whether the value of this

deficiency should be indicated on the x axis, the y axis or both.

Likewise, recently a lawsuit was filed by a former St. Louis Rams football player and three fans against the New England Patriots¹⁸ claiming that the Patriots surreptitiously taped the Rams' walk-through practice the day prior to their meeting in the 2002 Super Bowl. As far as may be gleaned from newspaper reports, the action is based in fraud. While fraud is a bona fide and mature legal theory, the facts here regarding the factual nature of the representations made, if any, leave the theory weakly supported by the facts and probably deficient as a matter of law.

There is crossover, as well, with the analysis of the y and z axes. In Montana, a plaintiff who changed his name from Bob Craft to Jack Ass sued the producers of the movie "Jackass" claiming trademark and copyright infringement and defamation.¹⁹ While Mr. Ass has latched onto bona fide legal theories, the brief recitation of facts seems to fall short of a compelling factual scenario supporting the theory. Likewise, the extent of Mr. Ass's injury or damage is not readily evident. In cases where damage or injury are part of the factual basis to support the legal theory of recovery, then the y and z values are necessarily dependent upon each other (and may influence the x value as well).

VI. OUT OF LIMITATIONS COMES STRENGTH

While many cases may present challenges for determining axes values, a strength of the rubric lies in its requirement that the discussion of the axes values is necessitated in the first instance. "Frivolous lawsuits" are a societal boogeyman; the monster that lurks in the dark waiting to pounce and wreak havoc and ruin. The rubric forces students, reformers and pundits to focus the rhetoric. Engaging in a detailed analysis

of whether a particular lawsuit or type of lawsuit should earn an "A" or an "F" value on the x or y axis necessarily forces a detailed discussion and analysis of the elements of the claim, rather than a vague tirade against all things "bad." This type of discussion and analysis may be able to turn empty attack rhetoric into real and focused discussion about the need, or lack of need, to modify identified common law theories. Scattershot reform proposals, if directed to the rubric, will need to be aimed more specifically and explained along the lines of precisely which weakness the reform is designed to address.

VII. THE PUBLIC DEBATE, REPHRASED

The goal of this article has been to suggest a way to get past the rhetoric of "frivolity" to a more precise analysis of perceived deficiencies in the civil justice system. The suggested x, y and z axes analysis may be useful for serious public policy critique and evaluation, but it is unlikely to find its way into the on-going public debate that takes place in newspapers and blogs. Because those arenas are the public face of the tort reform debate, it would be a mistake to close this discussion without proposing a way to sharpen the public or "amateur" rhetoric on the subject. Toward that end I would propose that the "frivolous lawsuit" designation may be sharpened and replaced as follows:

For a case that exhibits weakness on the Law (x axis):
"unwarranted."

For a case that exhibits weakness on Liability (y axis):
"unsupported."

For a case that exhibits weak Damages (z axis):
"insubstantial."

Reframing the lexicon of lawsuit criticism may begin to sharpen the debate. An appropriate response to the next

editorial rant about frivolous lawsuits would be to request that the critic be more specific. Is the specific complaint that the lawsuit is unwarranted by the law, unsupported by the facts or insubstantial in its claimed losses? Demanding precision in criticism should help to separate the reforms that are aimed at improvement of the system from those that are aimed at improvement of individual self-interests.

VIII. CONCLUSION

Continued railing against "frivolous lawsuits" creates the atmosphere for dishonestly cloaking self-interested reforms in the language of the public good. Any governmental system can be improved with reforms, but only those reforms that legitimately address the parts of the system that fail to function are in the public's interest. Toward that end, the rhetoric of "frivolous lawsuits" should be vigorously challenged in the marketplace of political discourse with a demand for specificity. This article attempts to establish a framework to support that more focused discourse. Any policymaker who is genuinely interested in enhancing the public good should welcome any device that exposes and distinguishes vague and amorphous complaints from real deficiencies. Perhaps the rubric proposed in this article can contribute to that process.

ENDNOTES

¹ See e.g., Associated Press, *300-pound Inmate Sues County Over Meager Jailhouse Fare*, April 28, 2008, LexisNexis Academic. In this wire service news article about a 300 lb. Arkansas inmate suing the state for starving him in prison, the reader must wait until the next to last sentence of the article to find that the lawsuit was filed *pro se*.

² See, e.g., CONN. PRACTICE BOOK, Rule 3.1, at <http://www.jud.ct.gov/Publications/PracticeBook/PB1.pdf> accessed June 18, 2009.

³ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

⁴ See, e.g., Deborah Ng, *Top Ten Frivolous Lawsuits*, legalzoom.com, at <http://www.legalzoom.com/legal-articles/top-ten-frivolous-lawsuits.html>, accessed June 18, 2009.

⁵ *The Actual Facts About the McDonald's Coffee Case*, 'LECTRIC LAW LIBRARY, lectlaw.com at <http://www.lectlaw.com/files/cur78.htm> accessed January 25, 2010. Stella Lieback, 79, was a passenger in a car driven by her grandson. They purchased hot coffee at the drive-up window of a McDonald's franchise. The car was moved out of the drive up area and pulled over to a stop. Ms. Lieback held the coffee cup between her knees as she removed the cover in order to put cream and sugar in her coffee. As she did so, the entire contents of the coffee spilled into her lap resulting in third degree burns to her groin, genitals, buttocks and inner thighs. The crucial facts that are rarely publicized include the fact that the coffee served by McDonalds was maintained in the coffee urns at between 180-190 degrees fahrenheit – between 45 and 55 degrees hotter than coffee is brewed in a home coffee pot. At trial, experts testified that liquid at 180 degrees would cause third degree burns within two to seven seconds after contact with human skin. McDonald's own quality assurance manager engineer testified during trial that the coffee that McDonald's served, at the temperature at which it was served, was unfit for human consumption.

⁶ *Cummings v. Office of Catholic Education*, No. 05-104, 2005, U.S. Dist., E. PA. (Order-Memorandum, May 10, 2005), at <http://www.paed.uscourts.gov/documents/opinions/05D0584P.pdf>, accessed June 18, 2009.

⁷ Joe Milicia, *Viewer Sues NBC over "Fear Factor" Rat-Eating Episode*, Law.com at <http://www.law.com/jsp/article.jsp?id=1104759364675> accessed June 18, 2009.

⁸ DecDec Correll, *Prisoner's Lawsuit Says it Was Too easy to Escape*, L.A. TIMES, Jan. 13, 2008, at <http://www.latimes.com/news/nationworld/nation/la-na-jailescape13jan13.1.1452469.story?coll=la-headlines-nation&ctrack=1&cset=true> accessed June 18, 2009.

⁹ *Id.*

¹⁰ *Topless Dancer Wins on TV's "Court,"* ASSOCIATED PRESS, July 09, 1998, LexisNexis Academic.

¹¹ *Id.* at 7.

¹² *The Actual Facts About the McDonald's Coffee Case*, 'LECTRIC LAW LIBRARY, lectlaw.com at <http://www.lectlaw.com/files/cur78.htm> accessed June 18, 2009.

¹³ *Angry Anna Fans Sue Penthouse for \$8.99*, CHICAGO SUN-TIMES, August 28, 2002, at 12, LexisNexis Academic.

¹⁴ See, e.g., Martha Neil, *Suit Seeks Damages in Electrocution Allegedly Resulting from Wired Window*, CHICAGO DAILY LAW BULLETIN, Nov. 26, 1997, LexisNexis Academic., (describing a lawsuit based on a would be burglar's electrocution at the hands of a booby-trapping bar owner).

¹⁵ Larry Neumeister, *Judge Lets Naked Cowboy Suit Go On*, ASSOCIATED PRESS, June 23, 2008, LexisNexis Academic.

¹⁶ Nakedcowboy.com at <http://www.nakedcowboy.com/index.html> accessed June 18, 2009.

¹⁷ *Overton v Anheuser-Busch Co*, 205 Mich. App. 259, 261; 517 NW2d 308 (1994).

¹⁸ John Branch and Greg Bishop, *Suit Could Shed Light on Actions of Patriots*, NY TIMES, Feb. 16, 2008, at <http://www.nytimes.com/2008/02/16/sports/football/16nfl.html?ref=sports> accessed June 18, 2009.

¹⁹ *Names and Faces*, WASHINGTON POST, Jan. 2, 2003. LexisNexis Academic.

REBUKING: A JEWISH ALTERNATIVE TO WHISTLE-BLOWING

by Robert S. Wiener*

I. INTRODUCTION

Whistle-blowing is in the news again.¹ Bernard L. Madoff is behind bars for securities fraud, reported to federal prosecutors by his own sons.² The resume of Danny Pang, head of Private Equity Management Group (PEMGroup), was under scrutiny due to allegations by a former president of his firm³ before Pang committed suicide at 42.⁴

If you want to do the right thing, is whistle-blowing the right thing to do?⁵ Business ethicists have written extensively on the theme of blowing the whistle on corporations, but little on alternatives.⁶ And there is an alternative that might result in better communication, esprit de corps, and more ethical (and legal) behavior in businesses. Greater profitability through enhanced morale, greater efficiency, reduced legal costs, and a positive perception in the marketplace may follow. It's a Jewish alternative called rebuking.

II. BLOWING THE WHISTLE

The English language tells us much about our society's attitude toward whistle-blowing. Synonyms for whistle-blowing are negative: rat, snitch, fink, inform, squeal, and tattletale.⁷ Whistle-blowing is often seen as a betrayal of

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